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IN THE

Supreme Court of the United States

October Term, 1946

No. 1197

RINEHARD H. PETERS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

EUGENE D. O'SULLIVAN,
HUGH J. BOYLE,
Of Omaha, Nebraska,
Counsel for Petitioner.

Law Briefs—OMAHA LINO-SLUG PRINTING CO.—418 So. 18th St.

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UNITED STATES OF AMERICA,

Respondent.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

—o—o—

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OPINION SOUGHT TO BE REVIEWED

Your petitioner, Rinehard H. Peters, respectfully prays that a Writ of Certiorari issue to review a decision of the Circuit Court of Appeals for the Eighth Circuit,

rendered on the 3rd day of February, 1947, at Kansas City, Missouri, affirming the conviction of your petitioner in the United States District Court for the District of Nebraska, Norfolk, Nebraska, Division, Honorable John W. Delehant, District Judge, presiding.

—o—o—

SUMMARY AND SHORT STATEMENT OF THE MATTERS INVOLVED

The petitioner, Rinehard H. Peters, a white man, along with two other defendants, who were Indians, was indicted on September 18th, 1943, in the District of Nebraska, Norfolk Division, for a conspiracy laid under 18 U. S. C. A. 88, to transport in interstate commerce, stolen cattle from the Pine Ridge Indian Reservation in the State and District of South Dakota, to Norfolk, Nebraska, located in the Norfolk Division of the District and State of Nebraska, in violation of 18 U. S. C. A. 419a, the National Cattle Theft Act (R. 1 to 4, incl.). The petitioner pleaded "Not Guilty" to this Indictment on July 10th, 1944 (R. 22). The case proceeded to trial on September 18th, 1945 (R. 24, 25), and was concluded on September 19th, 1945 (R. 26, 27). A verdict of guilty was returned by the jury on said day (R. 9-27). A Motion for a New Trial was filed on September 21st, 1945 (R. 13 to 16). Thereafter, pursuant to a Motion and Stipulation of Counsel, and the order of the Court, the case was transferred for all further proceedings to the Omaha Division, District of Nebraska, at Omaha, Nebraska (R. 18 to 21, incl.). The Motion for a New Trial was argued and overruled by the Court, the District Court rendering a written opinion in the case (R. 31 to 38, incl.). The Court sentenced the petitioner to two years' imprisonment, and to pay the costs

of the prosecution (R. 41, 42). The petitioner furnished bail, and followed the proper procedure in appealing the case to the Circuit Court of Appeals for the Eighth Circuit. The case was argued and submitted on January 6th, 1947 (R. 140), and the judgment of the lower Court was affirmed (R. 156) on February 3rd, 1947, by a written opinion delivered by Thomas, Circuit Judge, which opinion was concurred in by Circuit Judges Gardner and Johnsen (R. 150 to 156, incl.). A Petition for Rehearing was filed within the time provided for by the rules and was overruled on March 4th, 1947. Application was filed to stay the Mandate on March 5th, 1947 (R. 163, 164), and same was stayed by the Court on March 6th, 1947, for a period of 30 days (R. 164).

The conspiracy charged in the Indictment was one alleged to have been entered into between the petitioner and the two Indians to violate the National Cattle Theft Act, to be found in Title 18, U. S. C. A., Section 419a.

The conspiracy which was made the basis of the prosecution was the general conspiracy statute, to be found in Title 18, U. S. C. A., Section 88.

The special conspiracy statute relating to cattle-stealing to be found in Title 18, U. S. C. A., Section 418a, was not used.

In other words, the special conspiracy statute which directly covered the case was ignored, and the general conspiracy statute was used.

The purpose and object of the alleged conspiracy was stated to consist of the mutual agreement of Rinehard H.

Peters, the petitioner, and the two Indians, Raymond Yellow Thunder and James Lawrence Janis, "to unlawfully, wilfully, knowingly and feloniously transport and cause to be transported in interstate commerce from the Pine Ridge Indian Reservation in the State and District of South Dakota to the City of Norfolk * * * in the Norfolk Division of the District and State of Nebraska, stolen cattle, which cattle said conspirators or some of them, would steal in said State and District of South Dakota, and to sell and dispose of same to one George Roman in said City of Norfolk and divide the profits of such unlawful sale thereof among them." (R. 1, 2).

The seven overt acts briefly were:

1. That on February 5th, 1943, Raymond Yellow Thunder did steal from George Shellenberger of Kile, South Dakota, 9 white face cattle and drive them to Brown Thunder's corral.

2. That the petitioner on February 9th, 1943, requested Raymond Yellow Thunder to drive these cattle to the James Lawrence Janis farm.

3. That the petitioner on February 9th, 1943, drove his truck to the James Lawrence Janis farm for the purpose of taking the cattle to Norfolk, Nebraska.

4. That on February 9th, 1943, the three alleged conspirators loaded the cattle at the said Janis farm into the petitioner's truck and transported them to Norfolk, Nebraska.

5. That on February 11th, 1943, the petitioner sold the cattle to George Roman at Norfolk, Nebraska, for $526.85.

6. That the petitioner on February 11th, 1943, at Norfolk, Nebraska, gave Raymond Yellow Thunder $200.00.

7. That the petitioner at the same time and place gave James Lawrence Janis $25.00.

At the time of the trial James Lawrence Janis had died.

The only witness to the transaction with the petitioner was Raymond Yellow Thunder (R. 50 to 55, incl.). He testified that Peters told him three weeks after December 9th, 1942, when he first met Peters, "to get ten head of cattle and not give a damn what brand is on them." He, Yellow Thunder, testified that on February 9th, 1943, he stole 6 red white faced cows and 4 black white faced cows from George Shellenberger's pasture and that these cattle were branded G over S, and drove them to Brown Thunder's place and later to the Janis farm where 9 of them were loaded on Peters' truck and the 10th got away (R. 50, 51). He further stated that he did not remember that Peters said anything as to what was to be done after the cattle were loaded (R. 51, 52), but he knew the cattle were going to be taken to Norfolk, Nebraska, as Peters told him so (R. 52), and that Peters, Janis and he, Yellow Thunder, went to Norfolk with the cattle and the next day Peters gave him $200.00 for getting the cattle and gave Janis $25.00 for helping drive the truck (R. 52). This is the sum total of Yellow Thunder's testimony except as to certain inconsistencies in his evidence.

The Government also called George E. Shellenberger (R. 46 to 48, incl.), and his wife (R. 48, 49), who testified about 10 head of cattle being stolen and having recovered one of them, a black white face. That the nine head of

cattle were three black white face and 6 red white face. The largest cow weighed 1,700 pounds and the others would average 1,000 pounds each, and 7 head were branded G over S. At page 48 of the Record Mr. Shellenberger stated that the big cow weighed 1,700 pounds, another five-year-old cow that weighed 1,100 pounds, a four-year-old black white face weighed 900 pounds, a five-year-old red white face weighed 1,100 pounds, a four-year-old red white face weighed 850 pounds, a four-year-old red white face weighed 1,100 pounds, a two-year-old red white face weighed 650 to 700 pounds, and a four-year-old red white face weighed 1,100 pounds.

The Government called George Roman of Norfolk, Nebraska, who was a wholesale and retail meat dealer, whom the Indictment charged bought the stolen cattle, and he testified that he bought 9 head of cattle from Peters on February 11th, 1943, and paid him $526.85, plus $6.00 and $7.00 in meat for same (R. 56); that he had been in business for 38 years at Norfolk, Nebraska, and had been in the meat business 51 years (R. 56); that the 9 head of cattle weighed around 6,000 pounds, and that he paid Peters 8 cents a pound for same, and that the 9 head of cattle averaged about 700 pounds each; that they were from a Texas stock, rough stuff; that they were brindle faced cattle and "there wasn't one with a clear white face in the bunch" (R. 57); that he did not know whether he saw a brand of G over S on any of the cattle, but he would say "there were at least two or three different brands on these cattle;" and that there was no 1,700-pound cow or 1,100-pound cow in the bunch, but that the heaviest one was about 800 pounds (R. 59); that he had bought livestock from Peters previously; that he was no relative of Peters; that he was not present when the cattle were weighed (R. 59, 60).

These were the only witnesses called by the Government on the case in chief.

The defendant made a Motion for a directed verdict challenging the sufficiency of the Indictment, the sufficiency of the evidence to support the Indictment, the sufficiency of the evidence to prove guilt beyond a reasonable doubt; the point was also stressed that the cattle named in the Indictment and allegedly stolen from Shellenberger were clearly not the cattle sold George Roman and the failure to prove the conspiracy as alleged (R. 61, 62). The motion was overruled by the Court (R. 62).

The defendant offered the evidence of the following witnesses:

Harold A. Smith (R. 65, 66), Caroline Steffensmeier (R. 66, 67), who testified concerning Peters' whereabouts during the Christmas holidays of 1943.

Art Kelley testified as to Yellow Thunder's bad reputation and of Peters' whereabouts during the 1943 Christmas holidays.

Woodrow Handley testified that he was trucking for Peters about January 6th or 8th, 1943, and that Peters bought 2 cows, a heifer and a calf from Yellow Thunder, which evidence refuted the claim of Yellow Thunder that he first met Peters on December 9, 1943.

Several other witnesses were called, some of whose testimony was not of any material value, but two of whom, Mark Dulin (R. 72, 73) and Elmer Huebner (R. 73, 74) refuted Yellow Thunder's testimony that he was never in Buffalo Gap, South Dakota.

Rinehard H. Peters, the defendant and petitioner herein, testified in his own behalf (R. 76 to 126, incl.). He testified fully to the transaction had with Yellow Thunder. He stated that he bought the 9 head of cattle, which George Roman described, from Yellow Thunder for $375.00; that Yellow Thunder did not want to take a check for same, so he gave him $175.00 in cash when he bought the cattle, and paid him the balance he owed him at Norfolk, Nebraska; that the cattle were loaded at the Janis farm in broad daylight; that Peters was at the Janis place when he bought the cattle and the cattle were grazing about as close to the Janis place as to Yellow Thunder's, and Yellow Thunder drove them over to the Janis place; that the cattle were sold to George Roman, and that Janis and Yellow Thunder rode to Norfolk in the cattle truck with him; that the cattle he bought and sold to George Roman were brockel-faced and speckled and did not fit the description of the George Shellenberger cattle; that he had previously bought 2 cows, a heifer, and a calf from Yellow Thunder (R. 76 to 86, incl.). Peters denied that there ever was any conspiracy entered into between the 2 Indians and himself, or that the cattle were the stolen Shellenberger cattle, or were to his knowledge stolen cattle.

The Motion for a Directed Verdict was renewed by Peters' Counsel, after both sides had rested their cases, and was overruled by the Court (R. 127, 128).

The case was argued to the jury and thereafter the Court instructed the jury (R. 129 to 143, incl.).

Counsel for the defendant excepted to portions of the Judge's instructions (R. 143 to 148, incl.). These exceptions dealt with the fact that the prosecution was grounded

on the general instead of the applicable special conspiracy statute; the fatal variance in Overt Act 1 of the Indictment, which fixed the date of the theft of the Shellenberger cattle as February 5th, 1943, when the proof showed the date to be February 9th, 1943; that the transportation was alleged to have been in an International truck from the Indian Reservation to Norfolk, Nebraska, when the proof showed the transportation was by the International truck from the Indian Reservation to Oakdale, Nebraska, and thence by another truck from Oakdale, Nebraska, to Norfolk, Nebraska.

That because of these fatal variances, and the proof that the Shellenberger cattle were larger cattle and different colored cattle, the case failed utterly, and should not have been submitted to the jury at all, because there was no credible evidence whatsoever proving a conspiracy, or proving the overt acts, or proving that the Shellenberger cattle were the cattle sold to George Roman.

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BASIS OF JURISDICTION

The Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C. A., Title 28, Section 347).

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QUESTIONS PRESENTED

1. That it is the contention of the petitioner that it was error on the part of the Circuit Court of Appeals to hold in the opinion, as a matter of law, that, "In reviewing the record in a conspiracy case to determine the sufficiency or insufficiency of the evidence it is not for this

Court 'to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is *substantial* evidence, taking the view most favorable to the Government, to support it. . . .' " That to apply said asserted propositions of law so announced would deny the appellant the benefit of the fundamental rule of criminal law, that before his conviction could be had or sustained his guilt must be proved by evidence beyond a reasonable doubt, and announcing in lieu thereof the rule that, "The verdict of the jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it."

2. That it was error on the part of the Circuit Court of Appeals to say as a matter of law that, "Circumstantial evidence is sufficient to sustain a verdict when the facts and circumstances are such as legitimately sustain an inference of their existence," and scrapping the well established rule to be applied in criminal cases that before a conviction may be had or sustained on circumstantial evidence that such evidence must be so strong, clear and convincing as to exclude every reasonable hypothesis other than the guilt of the defendant.

3. That it was error on the part of the Circuit Court of appeals, in applying the foregoing rules to the evidence in this case, to state that, "We think it is clear that the jury was warranted in inferring the existence of the conspiracy alleged in the indictment and that Peters participated in it." In the light of the rule that everyone accused of a criminal offense is presumed to be innocent until he has been proved to be guilty by evidence beyond a reasonable doubt where the proof offered is direct evidence or if circumstantial evidence is relied on, then the

evidence must be so strong, clear and convincing as to exclude every reasonable hypothesis other than guilt.

4. That for the reasons last stated we believe that it was error also on the part of the Circuit Court of Appeals to hold that under the evidence, "The conversations, the contact of the parties and their concurrent and cooperative actions sustain the *inference* of the jury that a criminal conspiracy existed and that all the defendants participated in it."

5. That we contend that the quantum or degree of proof necessary to sustain a conviction in a criminal case before a Trial Judge should remain the same when the case is heard and decided in an Appellate Court, because Justice knows but one norm or standard for measuring and determining legal guilt. The law should not be so elastic as to permit the Appellate Court to use a different measure or yardstick than the one which is mandatory upon the Trial Court and the jury to use before a verdict of guilty may be returned against a defendant. The law does not contemplate that the rigors of the rule which is applicable in the lower Courts shall be relaxed in favor of the Government in the Appellate Courts.

6. That at least since the decision in the case of *Erie Railroad vs. Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 81 L. ed. 1188, 114 A. L. R. 1487, the long-established and consistently followed rule of law in the United States Courts that "where there was substantial evidence to sustain a conviction, the Appellate Court cannot pass upon its weight" has been abrogated, and the law of the State in which the alleged offense was tried governs, and in the instant case the law of Nebraska applies, which law is that before a conviction of a lower Court can be affirmed

if the proof is made by direct evidence same must be by evidence beyond a reasonable doubt, and if the proof is by circumstantial evidence then same must be by evidence so strong, clear and convincing as to exclude every reasonable hypothesis other than the guilt of a defendant.

7. That in the instant case no proper quantum of proof was produced upon the trial to establish the existence of a conspiracy to transport in interstate commerce stolen cattle from the Pine Ridge Indian Reservation in the State and District of South Dakota to Norfolk, Nebraska.

8. That there was no credible evidence to show, as the Government claimed, that the George Shellenberger cattle were transported in interstate commerce.

9. That we believe that the correct rule of law which should have been applied in the instant case was either that which is announced in the Eighth Circuit Court of Appeals in cases of *Sullivan vs. United States,* 283 Fed. 865; *Siden vs. United States,* 9 F. (2d) 241, modified in 14 F. (2d) 846; *Haning vs. United States,* 21 F. (2d) 508; *Salinger vs. United States,* 23 F. (2d) 48; *Danaher vs. United States,* 39 F. (2d) 325; and *Reed vs. United States,* 42 F. (2d) 636, which rule is that "where all of the substantial evidence is as consistent with innocence as with guilt, it is the duty of the Appellate Court to reverse the judgment of conviction," or that the verdict was not supported by the proper quantum of proof.

10. That we believe that it was error on the part of the Circuit Court of Appeals to announce and enforce rules of law which deprived the petitioner of the right guaranteed to him under Article V of the Amendments to the Constitution of the United States, which in so far as

applicable provides that, "No person shall . . . be deprived of . . . liberty . . . without due process of law."

11. That in the opinion the Circuit Court inadvertently stated that on February 9th, 1943, Yellow Thunder drove 10 head of cattle out of the George Shellenberger pasture to Brown Thunder's place and then, at the direction of Peters took them over to Janis' place and put them in the barn; that on February 10th Peters came to Janis' place with a truck and Peters, Janis and Yellow Thunder loaded nine of the cattle in the truck, etc., whereas Yellow Thunder stated that he took the cattle before noon on February 9th, 1943 (T. 50), and they were loaded on the Peters' truck the same day (T. 51) and arrived at Norfolk, Nebraska, before noon on February 10th, 1943 (T. 52), and the cattle were put in the George Roman feed lot and were paid for on February 11th, 1943, by George Roman (Ex. 1, T. 63).

12. That the appellant was indicted, tried and convicted on a United States Statute which was inapplicable and improper, to-wit, the General Conspiracy Statute of the United States, 18 U. S. C. A. 88, when he should have been indicted, tried and convicted on the Special Conspiracy Statute relating to Cattle Stealing, 18 U. S. C. A. 418(a) and 419(b).

WHEREFORE, your petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Eighth Circuit, commanding said Court to certify, and send to this Court, a full and complete Transcript of the Record and of the proceedings of the said Circuit Court had in the case numbered and entitled on its Docket No. 13,348, Criminal,

Rinehard H. Peters vs. United States of America, to the end that this cause may be reviewed and determined by this Court, as provided for by the Statutes of the United States, and that the Judgment herein of said Circuit Court may be stayed and petitioner released on bail during the pendency of this appeal, and that the Judgment herein may be reversed by this Court, and for such other and further relief as to this Court may seem proper.

EUGENE D. O'SULLIVAN and
HUGH J. BOYLE,
Attorneys for Petitioner.

IN THE

Supreme Court of the United States

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October Term, 1946

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No.————

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RINEHARD H. PETERS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

—o—o—

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

—o—o—

THE OPINIONS OF THE LOWER COURTS

The opinion of the Circuit Court of Appeals for the Eighth Circuit has not, as yet, been reported in the Advance Sheets. The decision in the case, however, was rendered on February 3rd, 1947, and same is to be found in the printed Record at pages 151 to 156, inclusive.

A Memorandum Opinion was rendered by the Trial Court and same is to be found in the printed Record at pages 31 to 38, inclusive.

JURISDICTION

As aforestated, the opinion of the Circuit Court was rendered on February 3rd, 1947 (R. 151 to 156, incl.), and a Petition for a Rehearing was filed within the required time provided for in the Rules, to-wit, on February 17th, 1947 (R. 157 to 162, incl.), which Petition was overruled on March 4th, 1947 (R. 163). Thereafter a Motion to Stay the Mandate was filed on March 5th, 1947 (R. 164), and an Order Staying the Mandate for a period of 30 days (R. 164) was made by the Court on March 6th, 1947.

The Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13th, 1925, Section 347, Title 28, U. S. C. A.

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STATEMENT OF THE CASE

A rather complete statement of the case having been made in the Petition for the Writ of Certiorari, it would serve no useful purpose to restate the facts in the case here. The Court's attention is therefore directed to pages 2 to 9 of said Petition.

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SPECIFICATIONS OF ERROR

1. That it is the contention of the petitioner that it was error on the part of the Circuit Court of Appeals to hold in the opinion, as a matter of law, that, "In reviewing the record in a conspiracy case to determine the sufficiency or insufficiency of the evidence it is not for this Court 'to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if

there is *substantial* evidence, taking the view most favorable to the Government, to support it. . . .' " That to apply said asserted propositions of law so announced would deny the appellant the benefit of the fundamental rule of criminal law, that before his conviction could be had or sustained his guilt must be proved by evidence beyond a reasonable doubt, and announcing in lieu thereof the rule that, "The verdict of the jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it."

2. That it was error on the part of the Circuit Court of Appeals to say as a matter of law that, "Circumstantial evidence is sufficient to sustain a verdict when the facts and circumstances are such as legitimately sustain an inference of their existence," and scrapping the well established rule to be applied in criminal cases that before a conviction may be had or sustained on circumstantial evidence that such evidence must be so strong, clear and convincing as to exclude every reasonable hypothesis other than the guilt of the defendant.

3. That it was error on the part of the Circuit Court of appeals, in applying the foregoing rules to the evidence in this case, to state that, "We think it is clear that the jury was warranted in inferring the existence of the conspiracy alleged in the indictment and that Peters participated in it." In the light of the rule that everyone accused of a criminal offense is presumed to be innocent until he has been proved to be guilty by evidence beyond a reasonable doubt where the proof offered is direct evidence or if circumstantial evidence is relied on, then the evidence must be so strong, clear and convincing as to exclude every reasonable hypothesis other than guilt.

4. That for the reasons last stated we believe that it was error also on the part of the Circuit Court of Appeals to hold that under the evidence, "The conversations, the contact of the parties and their concurrent and cooperative actions sustain the *inference* of the jury that a criminal conspiracy existed and that all the defendants participated in it."

5. That we contend that the quantum or degree of proof necessary to sustain a conviction in a criminal case before a Trial Judge should remain the same when the case is heard and decided in an Appellate Court, because Justice knows but one norm or standard for measuring and determining legal guilt. The law should not be so elastic as to permit the Appellate Court to use a different measure or yardstick than the one which is mandatory upon the Trial Court and the jury to use before a verdict of guilty may be returned against a defendant. The law does not contemplate that the rigors of the rule which is applicable in the lower Courts shall be relaxed in favor of the Government in the Appellate Courts.

6. That at least since the decision in the case of *Erie Railroad vs. Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 81 L. ed. 1188, 114 A. L. R. 1487, the long-established and consistently followed rule of law in the United States Courts that "where there was substantial evidence to sustain a conviction, the Appellate Court cannot pass upon its weight" has been abrogated, and the law of the State in which the alleged offense was tried governs, and in the instant case the law of Nebraska applies, which law is that before a conviction of a lower Court can be affirmed if the proof is made by direct evidence same must be by evidence beyond a reasonable doubt, and if the proof is

by circumstantial evidence then same must be by evidence so strong, clear and convincing as to exclude every reasonable hypothesis other than the guilt of a defendant.

7. That in the instant case no proper quantum of proof was produced upon the trial to establish the existence of a conspiracy to transport in interstate commerce stolen cattle from the Pine Ridge Indian Reservation in the State and District of South Dakota to Norfolk, Nebraska.

8. That there was no credible evidence to show, as the Government claimed, that the George Shellenberger cattle were transported in interstate commerce.

9. That we believe that the correct rule of law which should have been applied in the instant case was either that which is announced in the Eighth Circuit Court of Appeals in cases of *Sullivan vs. United States,* 283 Fed. 865; *Siden vs. United States,* 9 F. (2d) 241, modified in 14 F. (2d) 846; *Haning vs. United States,* 21 F. (2d) 508; *Salinger vs. United States,* 23 F. (2d) 48; *Danaher vs. United States,* 39 F. (2d) 325; and *Reed vs. United States,* 42 F. (2d) 636, which rule is that "where all of the substantial evidence is as consistent with innocence as with guilt, it is the duty of the Appellate Court to reverse the judgment of conviction," or that the verdict was not supported by the proper quantum of proof.

10. That we believe that it was error on the part of the Circuit Court of Appeals to announce and enforce rules of law which deprived the petitioner of the right guaranteed to him under Article V of the Amendments to the Constitution of the United States, which in so far as applicable provides that, "No person shall . . . be deprived of . . . liberty . . . without due process of law."

11. That in the opinion the Circuit Court inadvertently stated that on February 9th, 1943, Yellow Thunder drove 10 head of cattle out of the George Shellenberger pasture to Brown Thunder's place and then, at the direction of Peters took them over to Janis' place and put them in the barn; that on February 10th Peters came to Janis' place with a truck and Peters, Janis and Yellow Thunder loaded nine of the cattle in the truck, etc., whereas Yellow Thunder stated that he took the cattle before noon on February 9th, 1943 (T. 50), and they were loaded on the Peters' truck the same day (T. 51) and arrived at Norfolk, Nebraska, before noon on February 10th, 1943 (T. 52), and the cattle were put in the George Roman feed lot and were paid for on February 11th, 1943, by George Roman (Ex. 1, T. 63).

12. That the appellant was indicted, tried and convicted on a United States Statute which was inapplicable and improper, to-wit, the General Conspiracy Statute of the United States, 18 U. S. C. A. 88, when he should have been indicted, tried and convicted on the Special Conspiracy Statute relating to Cattle Stealing, 18 U. S. C. A. 418(a) and 419(b).

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ARGUMENT

Points 1, 2, 3, 4, 5 and 6

In view of the fact that the above numbered points are so related to each other, we feel that they should be discussed together. The Circuit Court of Appeals, we contend, was wrong in stating in its opinion that—

> "in reviewing the record in a conspiracy case to determine the sufficiency or insufficiency of the evidence

it is not for this Court to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." (C. C. A. Opinion, R. 151, 152.)

We are aware of the fact that this language is taken verbatim from the case of *Glasser vs. United States,* 315 U. S. 60, 80; 62 S. Ct. 457; 86 L. ed. 680, as pointed out by the Circuit Court. We are also aware of the fact that this statement was based upon the decision of *United States vs. Manton* (C. C. A. 2d), 107 F. (2d) 834, 839, and that this language is supported also by *Pilgrim vs. United States* (C. C. A. 8th), 157 F. (2d) 427, 428; *Joyce vs. United States* (C. C. A. 8th), 153 F. (2d) 364, 366; *Braatelien vs. United States* (C. C. A. 8th), 147 F. (2d) 888, 893; and *Egan vs. United States* (C. C. A. 8th), 13 F. (2d) 369, 375-376. However, this pronouncement of law, we think, is violative of the fundamental legal principle relating to the presumption of innocence and to the rule that all legal doubts shall be resolved in favor of an accused, and modifies drastically these rules so that they now are, that an accused is presumed to be innocent and all reasonable doubts of law and fact shall be resolved in the Trial Court, by the Judge and jury, in favor of the accused, but in the Appellate Courts the presumption of innocence no longer exists and all legal and factual doubts shall be resolved in favor of the accuser—the Government. Just why different rules are thus applicable in the Appellate Courts than are applied in the Trial Courts, with reference to the presumption of the innocence of an accused, and the quantum or degree of proof, is hard to understand. Certainly the law should operate uniformly, regardless of the Judicial Forum where it is being applied or administered.

What we have heretofore stated applies with equal

force, also, to the following excerpts from the Circuit Court's Opinion:

> "Circumstantial evidence is sufficient to sustain a verdict when the facts and circumstances are such as legitimately sustain an *inference* of their existence." (C. C. A. Opinion, R. 152., citing *Curley vs. United States* (App. D, C.), —— F. (2d) ——, decided January 13th, 1947.)

> "We think it is clear that the jury was warranted in *inferring* the existence of the conspiracy alleged in the indictment and that Peters participated in it." (C. C. A. Opinion, R. 152.)

> "The conversations, the conduct of the parties and their concurrent and cooperative actions sustain the *inference* of the jury that a criminal conspiracy existed and that all the defendants participated in it." (C. C. A. Opinion, R. 153.)

In the instant case there was no direct evidence relating to a conspiracy to transport stolen cattle in interstate commerce. There was no substantial, credible, direct evidence of a conspiracy to steal cattle, leaving out of consideration the matter of an interstate transportation.

These three pronouncements of the Circuit Court are in conflict with the law announced by the Circuit Court of Appeals for the Eighth Circuit in *U. S. F. & G. Co. vs. Des Moines National Bank*, 145 Fed. 273, which case holds that a theory cannot be established in a case by circumstantial evidence unless the facts relied on are such that it is the only conclusion that can be reasonably drawn from them.

In *Stubbs vs. United States* (C. C. A. 4th), 2 F. (2d) 468, it was held that an instruction was proper which stated

that a conviction may be based on circumstantial evidence, if the circumstances relied on point so unerringly to accused's guilt as to exclude every reasonable hypothesis, and that circumstances must be proved to jury's satisfaction beyond a reasonable doubt, and be consistent with each other.

In the case of *The Jane vs. United States,* 7 Cranch. 363, 3 L. ed. 372, it is held that in presumptive evidence the circumstances proved ought not only to harmonize with each other, but they ought in themselves to be so strong as fully to satisfy the mind of the fact they are intended to establish.

The three statements heretofore quoted from the opinion are not correct statements of the law in the light of the law announced in these aforementioned three Federal cases.

Certainly an accused cannot be convicted on guess, conjecture and inference.

In the instant case there really was no substantial evidence upon which a conviction could be granted. In the cases heretofore referred to where the "substantial evidence rule" was invoked, a reading of them will disclose that the evidence was not only substantial but definitely overwhelming. There was no reason, therefore, to depart from the rule that proof of guilt must be made by evidence beyond a reasonable doubt when direct testimony was produced, or the rule relating to a case where circumstantial evidence was relied upon, that the evidence must be so strong, clear and convincing as to exclude every reasonable hypothesis other than guilt.

Point 7

In the instant case no proper quantum of proof was produced upon the trial to establish the existence of a conspiracy to transport stolen cattle in interstate commerce from South Dakota to Nebraska.

All of the decided cases are in accord that the gist of the crime of conspiracy is the confederation or combination of minds. No Federal offense would exist if the conspiracy was one to steal cattle in South Dakota. The offense is grounded upon the transporting, pursuant to an agreement, of stolen cattle from South Dakota to Nebraska, and the commission of an overt act in pursuance thereof and in furtherance of the conspiracy.

As heretofore pointed out the evidence as to procuring cattle was that Yellow Thunder stated that Peters said: "to get 10 head of cattle and not give a damn what brand is on them" (R. 50). This did not constitute a direction from Peters or even an agreement or combination that Yellow Thunder should steal 10 head of cattle. As far as the evidence relating to an agreement to truck the cattle to Norfolk was concerned, the only evidence in the record was that given by Yellow Thunder, and he stated nothing about any agreement to do so, but that "Peters told me at the Janis farm we were going to take the cattle to Norfolk. After the cattle were loaded, Peters, Lawrence Janis and I got into the truck in the evening and headed for Norfolk" (R. 52). This does not show an agreement, even if the truthfulness of these statements were admitted for the sake of argument. At best it would show an independent act of Peters, and not a concurring course of conduct on Peters', Janis' and Yellow Thunder's part. These statements attributed to Peters and what Peters did is

more consistent with innocence than with guilt. It also must be remembered that Peters was a livestock buyer and that he denied Yellow Thunder's story. Why the three men rode to Norfolk is explained by Peters. Yellow Thunder wanted to collect the balance for the livestock and Janis was to help drive the truck.

Point 8

A reading of the Record discloses that the Shellenberger cattle could not have been the cattle trucked by Peters from South Dakota to Norfolk, Nebraska. The cattle lost by Shellenberger were different colored cattle—white-faced reds and white-faced blacks. They were also much larger cattle. Furthermore, a 1,700-pound cow, which Shellenberger positively said was stolen, is as big a freak in the cattleman's world as Barnum's Jumbo elephant was in the circus world. That 1,700-pound range cow would be a "standout" at George Roman's packing house. It would be as much an attraction in Roman's yards at Norfolk, Nebraska, as Barnum's Jumbo would be in a circus there. The combined weight of Shellenberger's cattle would be 9 cattle at 1,000 pounds each, totaling 9,000 pounds (R. 47, 48). The cattle sold by Peters to George Roman weighed about an average of 700 pounds each (R. 57). The price paid per pound by George Roman was 8 cents (R. 57), or a grand total of $539.85, maikng the total weight of the cattle 6,748⅛ pounds. If Peters had sold the Shellenberger cattle to George Roman the check would have been for 9,000 times 8 cents, or $720.00. Yellow Thunder's testimony was in defiance of the indisputable facts. When any witness' testimony is in defiance with the physical facts or the facts which do not permit of being disputed, that witness' testimony must be ignored, and the law never contemplates that the patent, indis-

putable facts, as was done in the instant case, should be ignored or cast aside.

Points 9, 10 and 11

The matters urged in these points are stated, we believe, sufficiently plain, and we will not attempt to argue same here.

Point 12

The Indictment in the instant case was grounded, as far as the claimed conspiracy was concerned, on Section 88 of Title 18, U. S. C. A., making it a criminal offense to conspire to commit a crime against the United States. This is the General Conspiracy Statute. The Indictment was drawn, as per the notation thereon (R. 4), charging a "violation Sections 88 and 419(a), Title 18, United States Code."

The Trial Court instructed the jury pursuant to these laws (R. 132).

We contended that the Special Conspiracy Statute, Section 418(a) was applicable and objected and excepted to the Court's charge to the jury in reference to the General Conspiracy Statute being applicable (R. 143, 144). The Court then further instructed the jury on both Conspiracy Statutes (R. 147, 148).

We believe that the correct rule of law should be that if there is a special Statute covering an offense it does not permit of a prosecution under a general Statute, which might also denounce the offense.

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CONCLUSION

It is therefore respectfully submitted that, for all of the foregoing reasons, the petitioner's Application for a Writ of Certiorari should be allowed as prayed.

Respectfully submitted,

EUGENE D. O'SULLIVAN and
HUGH J. BOYLE,
Attorneys for Petitioner.